

JOINT PUBLIC HEARING  
Senate Committee on Ethics Reform and  
Government Operations  
Assembly Committee on Consumer Protection  
on SB 298 / AB 427

David W. Helbach  
Secretary, State of Wisconsin Building  
Commission  
Administrator, Division of State Facilities

December 15, 2009  
North Hearing Room

## Background

- At their February 2008 meeting the Building Commission directed *"the Department of Administration to work with interested parties to clarify the conditions under which state interests are best served by employing alternative delivery methods as described in WI Stats. 13.49 (19) and recommend statutory language changes."*
- In developing a recommendation DSF researched best practices in other states and sought input from a wide variety of stakeholders
  - held several stakeholder listening sessions
  - developed numerous options
  - met with wide range of construction industry groups and other interested parties to seek input on current practices and potential changes
- Resulting recommendations were presented to the Building Commission and approved at their Sept 2009 meeting
- Members of the Building Commission introduced the recommendations as companion bills SB 298 and AB 427

## Current Law

- Construction contract bidding is governed by WI Stats (s. 16.855) and Administrative Code (ADM 21)
- S. 16.855 effectively requires the State to use multiple prime contracting to build and repair state facilities, unless the Building Commission votes to approve an alternative project delivery method under its s. 13.48 (19) waiver authority
- As the size and complexity of building projects has increased, the construction industry has evolved new project delivery methods that are better able to manage risk and complexity

2

## Current Law

- Over the past decade, approximately 10% of projects have received a waiver to employ an alternative delivery method
- Agencies have requested waivers from multiple prime delivery when alternative methods would help achieve project completion goals and help manage project risks
  - complex projects that would benefit from increased coordination among contractors
  - projects with inflexible completion dates
  - projects with short time frames that could benefit from schedule compression
  - technologically advanced designs that could benefit from construction expertise during the design phase
- Single Prime has been the most common alternative delivery method approved by the Building Commission, but construction manager at risk has been used on a few large complex projects

3

## Why Change?

- There is no perfect project delivery method they all have strengths and weaknesses
- Project owners, developers and constructors agree that the appropriate project delivery method depends on the owner's goals, capabilities and project characteristics
- Most Wisconsin public entities have the flexibility to select the appropriate delivery method
  - Wisconsin municipalities can choose between multiple and single prime delivery
  - Wisconsin school districts can choose among delivery methods
  - WTCS districts can choose between multiple and single prime delivery methods
- A majority of States allow for a variety of delivery methods and only four states rely on multiple prime more than Wisconsin (NY, PA, OH and ND)

4

## Multiple-Prime

**Definition** A method where in-house staff or contracted A/E firm prepare plans and specifications that are incorporated into a bid package. Contractors competitively bid the project and DSF awards contract to the lowest responsible bidder for each discipline or lowest combined bid. Agency retains significant responsibility for quality, cost, and time performance.

**Pros**

- Familiar delivery method/applicable to wide range of projects
- Open bidding is transparent and encourages competition on price
- Agencies retain significant control over end product

**Cons**

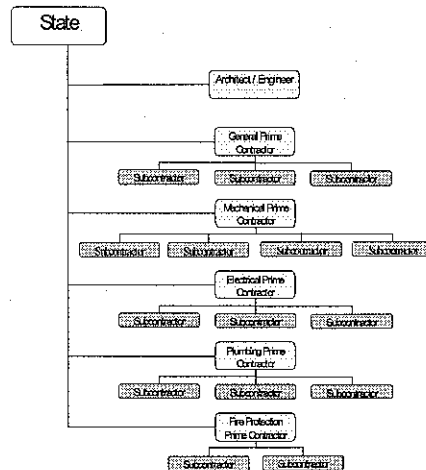
- No design phase assistance from contractor
- Longer schedule duration
- Initial low bid might not result in ultimate lowest construction or operational cost
- Prone to adversarial positions that may lead to disputes
- Greatest potential for time/cost growth

**Project Types**

- Clearly defined, standardized, repetitive work items
- Minor construction, maintenance or repairs that can be classified into small task orders

**Examples**

- Main source of project letting for state



5

# Single Prime

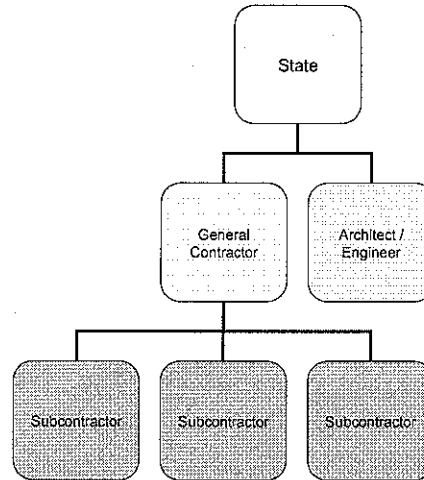
**Definition** A method where in-house staff or contracted A/E firm prepare plans and specifications that are incorporated into a bid package. General Contractors competitively bid the project and DSF awards contract to the lowest responsible bidder. Agency retains significant responsibility for quality, cost, and time performance.

- Pros**
- Familiar delivery method/applicable to wide range of projects
  - Open bidding is transparent and encourages competition on price
  - Agencies retain significant control over end product
  - Less prone to adversarial positions that may lead to disputes and negatively impact schedule

- Cons**
- No design phase assistance from contractor
  - Longer schedule duration
  - Initial low bid might not result in ultimate lowest construction or operational cost
  - Potential for time/cost growth

- Project Types**
- Projects with significant coordination issues
  - Projects with a majority of work in a single discipline
  - Projects unlikely to attract bids from MEP contractors

- Examples**
- UW Stout Jarvis Science Wing and Renovation
  - State Capitol Promenade Renovation



6

# Construction Manager at Risk

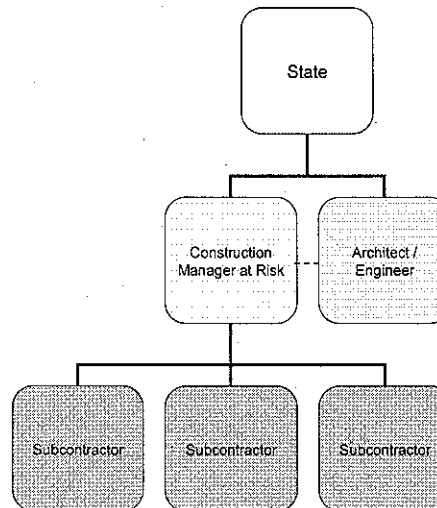
**Definition** A method where the construction manager at risk (CMAR) serves as a construction consultant during design phase and GC during construction phase. At a point in the design process, the CMAR and agency negotiate a Guaranteed Maximum Price (GMP) that is based on estimated cost for design, CM fee, and a construction contingency. Contingency can be used by agency as incentive for CM's performance.

- Pros**
- Design phase assistance from contractor
  - Single point of responsibility for construction
  - Fixes project cost and completion at earlier point in project timeline
  - Potential for schedule compression & faster delivery
  - Opportunity for shared savings between agency and CMAR

- Cons**
- Reduces agency's general management and oversight control
  - GMP approach may lead to a larger contingency to cover uncertainties and incomplete design elements

- Project Types**
- Large projects with multiple phases and contracts
  - Fast tracking – staged construction

- Examples**
- Project examples include UW-Madison Camp Randall Renovation, Interdisciplinary Research Complex and the new Union South facility



7

# Design Build

**Definition** A method where the agency contracts with single entity to provide both design and construction. The design/build team consists of contractor, architect and engineer. The design/builder contracts directly with the subcontractors and is responsible for delivery of the project. Selection is based cost and quality.

**Pros**

- Single point of responsibility for design and construction
- Faster schedule & delivery
- Earlier schedule and cost certainty

**Cons**

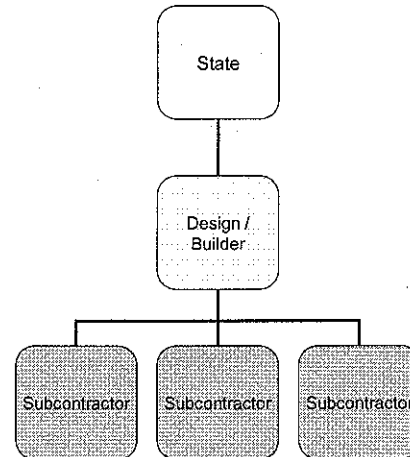
- Eliminates traditional check & balance system
- Less agency control over final design
- Fewer competitors and increased risk may result in higher initial costs
- Reduced opportunities for smaller, local construction firms

**Project Types**

- Smaller new or renovation projects that are schedule sensitive, standardized structures

**Examples**

- Project examples include UW-Madison Fluno Center, Taycheedah housing units (DOC), Milwaukee Probation/Parole facility (DOC) and build lease office buildings (DOA, DOR, Risser Center)



8

## Defining Project Delivery Options

- Four questions framed DSF's review of the state's approach to project delivery:
  - Which delivery methods should be available?
  - What criteria should guide the selection process?
  - Who should be authorized to select the project delivery method?
  - How should construction contracts be awarded once the project delivery method has been determined?

9

## Recommendation

<b>What methods are available?</b>	-Multiple Prime, Single Prime and CMAR identified in statutes, other innovative methods can be used if approved by Building Commission waiver
<b>What criteria are used to select?</b>	-Define criteria for selecting all available delivery methods (Multiple and Single Prime and CMAR) in administrative rule
<b>Who makes the delivery method selection?</b>	-Department of Administration Secretary or designee can select from any of the named methods based on DSF and Owner Agency staff recommendation, -Formal Building Commission action required to use other innovative methods
<b>Additional contracting provisions</b>	-Include specific protections in Single Prime contracts to prevent bid shopping and ensure fair treatment of MEP subcontractors, -Define CMAR firm selection process in administrative rule -Require CMAR to bid all work

10

## Recommendation Highlights

- Gives equal weight in statutes to three primary delivery methods - multiple prime, single prime and CMAR
- Requires rulemaking to specify criteria to guide DOA Secretary's selection of appropriate delivery method
- DOA secretary to base the decision on project characteristics and input from nonpartisan, professional civil servants
- Requires rulemaking to define protections for major subcontractors to a single prime contractor
- Requires rulemaking to define the CMAR firm selection process
- Maintains the Building Commission's waiver authority to address non-standard project delivery requests
- CMAR firms are required to bid out work, any exceptions from standard bidding practices to be defined in administrative rule.

11

## Recommendation Highlights

- The recommendation seeks to achieve several public goals:
  - Flexibility to select the appropriate project delivery method to achieve cost effective project delivery
  - Transparency and openness in the award of public construction contracts
  - Transparent CMAR firm selection process that relies on judgement of civil servants with construction expertise
  - Legislative and Stakeholder input into administrative rules that will guide project delivery selection

12

## Sample Contracting protections

- Potential Single Prime Subcontractor Protections:
  - Require bidders to submit a list of the major subcontractors along with their bid
  - Require prime contractor to submit pay requests within a specified time frame and pay subcontractors promptly
  - Provide primary subcontractors access to WisBuild to monitor project workflow and change orders
  - Require prime contractor to pay out subcontractor retainage when sub work is completed to satisfaction of DSF construction representative

13

Testimony on SB 298/AB 427  
Before the Senate Committee on Ethics Reform and Government Operations, and  
The Assembly Committee on Consumer Protection, by  
University of Wisconsin Associate Vice President David L. Miller  
December 15, 2009

Thank you Senator Risser and Representative Hintz for holding this hearing today. I am David Miller, Associate Vice President for Capital Planning for the UW System. I am speaking on behalf of the Board of Regents and our 13 universities for which the state manages construction projects in support of this legislation.

The UW System operates approximately 58,000,000 square feet of building space and manages about 18,000 acres of land. The UW System comprises about 63% of all state-owned building space and generally represents about same percentage of state-funded construction.

In this biennium alone the Legislature authorized approximately \$310,000,000 of state-taxpayer-funded construction and maintenance and approximately \$530,000,000 of university-generated program revenue and gift and grant-funded construction and maintenance for UW System facilities. The scale of both facilities management and construction management requires optimizing efficiency in every aspect of the process.

The UW System Board of Regents and UW institutions support SB 298 and AB 427 because the legislation seeks to increase efficiency and save money. We especially appreciate the work of Division of State Facilities Administrator Helbach and DSF staff in working for nearly two years with all of the involved parties to produce this legislation. We appreciate the Building Commission members who have strived to understand these complex issues and unanimously support this legislation.

The UW System thanks and supports all contractors and suppliers that partner to build some of the best facilities in the world for our students, faculty, and staff and ultimately the public.

We support this legislation because it has been thoughtfully and painstakingly created by studying the experiences of others states and forming policies based on best public practices.

The goals of the UW System, the Legislature, contractors, and the public are mutually agreeable; to be more efficient, fair to all contractors and vendors, and to build projects that



benefit users. We strongly believe that taxpayers, UW students, and benefactors all benefit from an open and competitive process and this legislation enhances competitive bidding.

This legislation adds single-prime bidding and construction manager methods to the current multiple-prime bidding system for project delivery. Currently, as has been described, the state uses multiple-prime bidding on the majority of projects. Alternative delivery methods may be used if a waiver of multiple-prime is granted by the Building Commission.

I would like to differentiate between single-prime bidding and construction manager in defining alternative delivery method. Both multiple-prime and single-prime are design-bid-build delivery methods. In the industry, the term alternative delivery method means an alternative to design-bid-build, not an alternative to multiple-prime bidding. In addition the industry considers single-prime and design-bid-build synonymous, because the existence of multiple-prime bidding in both public and private work is so scarce.

While we support this legislation as a carefully crafted compromise, it does not achieve the level of flexibility sought by the Board of Regents in providing the full array of project delivery methods to fit the broad range of projects undertaken by the UW System.

Alternative delivery methods include not only varieties of construction manager, but also, design-build, integrated project delivery, build-own-transfer models all of which are not addressed by this legislation, but presumably would still be available by Building Commission waiver.

There are reasons that the public sector cannot simply adopt private sector practices regardless of how efficient they might be. This legislation adapts private sector methods to ensure they meet the public accountability necessary to provide fairness and a level playing field for contractors. For example, the bill requires that DOA prescribe by Administrative Rule – approved by the Legislature, bidding protections for contractors of the major subdivisions of work to prevent such practices as “bid shopping.” These modifications are appropriate and necessary for public work.

We have been asked why not continue to use the waiver request process when projects other than multiple-prime are sought. The answer is that the project delivery method should fit the type of project being constructed, and that the multiple-prime method fits few projects that we construct.

Multiple-prime is most useful when the major divisions of work are not interdependent upon each other and can be performed without a high degree of coordination. Such a project would be in a building in which a general contractor would be performing envelope work such

as windows, doors, and masonry; while another contractor may be performing work inside the building independent of the general contractor. The UW does such projects and would continue to utilize multiple-prime bidding.

Single-prime contracting is best on the vast majority of projects to achieve best price and coordination.

There is a significant administrative cost to using multiple-prime bidding because the state has to develop and process four to five bid packages and then separate contracts instead of a single one. That is a wasteful and expensive process.

The primary disadvantage of multiple-prime is that responsibility and accountability for project management under multiple contracts is unclear and leads to confusion and uncoordinated work on the jobsite.

A contractor who performs late work may assert that this delay was caused by another contractor. When defective work is discovered, a contractor may claim that his work was proper when he performed it, but that another contractor's work caused the problem.

These situations leave the state and university with little recourse in resolving who is responsible for the problem and usually the owner ends up paying twice to rectify the issue. This is particularly a problem in project close out and occupancy.

In a single contract, the prime contractor is responsible for construction management and is required to resolve the problems since the contractor is responsible for the work of his subcontractors.

Using a construction manager is ideal for certain limited types of projects. For example a project that is particularly complex in design and will offer a significant number of design options to the owner benefits from the early involvement of a contractor that will be responsible for delivering the project. This legislation provides that the construction manager must publicly bid all work and if the CM seeks to self perform any of the work the Division of State Facilities will bid that portion.

In the design-bid-build method contractors are not involved until bidding on the project and must then negotiate any beneficial or necessary design changes. We have seen extremes in fluctuating bids on projects, especially since 2004. Most often these high and low bids are on complex projects that could take advantage of the contractors' early involvement.

The construction manager also improves the process by providing separate bid packages on the early stages of work. With a confirmed bid in hand on early work, the balance of the budget can be adjusted for the remaining work.

In the UW and in Wisconsin we have a two-tiered system, all facilities at our 13 two-year Colleges are built by local governments and we operate them. Just like the WTCS schools and local K-12 school districts they are not hamstrung by a multiple-prime limitation. In our newest building at UW Fox Valley; the Communication Arts Center, the building was built by a single-prime bid. This building will be the first in the UW System to achieve LEED certification for its sustainable construction practices and energy wise design features.

One aspect of construction that is often overlooked is the magnitude and variety of contractors that work on projects. The general contractor, mechanical, electrical, and plumbing contractors are only some of the trades in a long list of subcontractors on the job. All prime contractors have subcontractors and suppliers that contract directly with them and not the state. Therefore, the current system of multiple-prime only identifies some of the contractors as prime contractors.

Technology changes are rapidly impacting the construction industry that contain costs and promote efficiency. Design/bid/build, through single or multiple-primes, will have to change to reflect new software design tools that utilize Building Information Modeling (BIM), to allow for the transfer of digital designs from A/E to construction team to owner. If the state is going to realize the benefits and power of these tools, contractors will need to be much more integrated and single-prime and construction manager methods will facilitate this greatly. State projects will eventually have to require contractors to utilize these tools during project delivery.

Again, we thank you for bring this legislation forward and ask you to vote in favor.

**Thank you for your time and I would be glad to try to answer any questions you may have.**



## **American Subcontractors Association of Wisconsin, Inc.**

660 East Mason Street, Milwaukee, WI 53202-3877 • (414) 227-1230 • Fax: (414) 227-1290  
[www.asa-wi.org](http://www.asa-wi.org) • [mail@asa-wi.org](mailto:mail@asa-wi.org)

---

December 15, 2009

To: Senate Committee on Ethics Reform & Government Operations  
Assembly Committee on Consumer Protection

From: Jeffrey J. Beiriger  
Executive Director  
American Subcontractors Association of Wisconsin

Re: SB 298 & AB 497  
State Building Contracting and Construction Procedures

On behalf of the American Subcontractors Association of Wisconsin (ASA-WI), I am pleased to submit the following informational testimony regarding SB 298/AB 497.

The American Subcontractors of Wisconsin represents subcontractors and material suppliers performing work across Wisconsin, in every aspect of the trades (plumbing, electrical, flooring, painting, structural steel, etc.), without regard to whether the member is union-affiliated or not. What ties our organization together is an over-riding interest in fairness in relationships between subcontractors and general contractors/construction managers, and between subcontractors and owners.

While there are certain of our members more directly affected by SB 298/AB 497 – plumbing, electrical, HVAC, and fire protection contractors – it is important to note that the current statutes do not specifically limit the opportunity to bid work separately to these trades. As such, we see any change affecting state bidding practices to be an issue for all of our members.

When the Building Commission and the Department of Administration began the process of reviewing the current bidding practices, ASA-WI went to its members with a simple question. We asked them to identify the benefits of bidding directly to the end-user/owner. In doing so, we did not focus on *which* delivery method was selected – single prime, multiple prime, construction manager, or design-build – we focused on what the specific benefits were to our members when dealing directly with the owner.

In reviewing these benefits, it is important to note that there are some basic principles of construction bidding that simply cannot be overlooked, no matter the delivery method. A system for public bidding must be open, transparent, and competitive. And while there may be private-sector bidding methods that rely more on relationships and a "black box" approach to selecting contractors, we cannot support such a system when it comes to public-sector contracting.

Only in the context of an open and competitive bidding process, does our question to our members matter. And with that process ensured as a matter of public policy, the following benefits to bidding directly to an owner were identified:

- \* prompt payment
- \* access to general specifications and other bid documents
- \* ability to value engineer and/or directly negotiate change orders
- \* improved communication
- \* final payment not contingent upon other trades and punch list items
- \* transfer of risk (indemnification/hold harmless) limited owner-contractor relationship
- \* more control over damages for delay
- \* no bid shopping after apparent low bidder has been selected
- \* greater transparency and objectivity
- \* more contractors likely to bid (GC/CM relationships are not at issue)
- \* retainage provision are between the owner-contractor and subject to state law
- \* payment and performance bonds are issued directly with the owner
- \* information access is improved, including access to the WisBuild system

The more that we can preserve the advantages of bidding directly to an owner, the more likely it is that we are going to see high-value construction projects in our state. The reasons are simple - construction is a unique business in that contractors establish a price before they have even begun to build the product or their part thereof. As such, the industry necessarily takes risk into consideration in its pricing - the higher the risk, the higher the price. Risk can come in many identifiable forms - tight schedules, weather, an unfamiliar labor pool - but it can also come in more subtle forms, many of which are identified above. We believe that the state can get the best value for its construction dollar by mitigating, to the greatest extent possible, the controllable risk in the project.

We applaud the state's efforts to review and update its bidding practices, but caution that there are certain trade-offs that come with each delivery method - including the current practice. Yet we fail to see the compelling reason for having a revolution when an evolution is probably more in order.

The benefits of every system are varied and elusive. That being the case, the price for anything other than an open and competitive bidding process (that includes subcontractor protections) is probably too high.



# Wisconsin Pipe Trades Association

11175 West Parkland Avenue, Milwaukee, WI 53224  
414.359.1310

To: Chairman Risser, Chairman Hintz, and Members; Senate Committee on Ethics Reform and Government Operations, Assembly Committee on Consumer Protection

Fr: Steve Breitlow, Secretary/Treasurer  
Wisconsin Pipe Trades Association

Da: December 15, 2009

Re: State Construction Bidding Procedures

On behalf of more than 8,000 members statewide, I want to thank Chairman Risser, Chairman Hintz and committee members for allowing me to speak on behalf of the Wisconsin Pipe Trades Association (WPTA) as it relates to SB 298 and AB 427. I also want to commend the efforts of Secretary Dave Helbach, representatives of the Department of Administration and Building Commission members in working to facilitate a fair process of examining state bidding and procurement.

I am here to testify to explain some reservations our members working in the plumbing, mechanical, fire protection and steam fitting labor trades have about this legislation. State bidding and procurement is clearly more relevant to the contractors that are responsible for bidding on projects than the labor organizations I represent. Despite this fact, the Pipe Trades have been strongly engaged in this issue for nearly 10 years.

***Protecting the ability of our contractors to participate in a competitive and transparent state bidding process has consistently been a top priority.*** When every contractor we do business with bids on state projects, it increases our probability of work. And the current bidding process allows the most contractors access to state construction.

Portions of this legislation call for state relief of contract and project management. We can support this part of the bill so long as the bidding remains transparent and competitive. For instance, the current bid process requires the state to advertise and publicly-bid construction projects, and then award the construction to the lowest bidder or bidders. That competition saves money. The transparency ensures accountability for taxpayer-funded projects. We think the legislation can accomplish improved management of the project while preserving the current bidding process.

Additionally, all contractors on public projects ought to have protections in their contract. A state-crafted, standard construction agreement could address concerns like direct access to change orders, assurance of prompt payment, and private-sector bidding practices like bid-shopping. The quicker contractors in the construction chain-of-command receive payment, the sooner our wages and benefits are paid as well.

We are united with our specialty-trade contractors, as well as electrical workers, sheet metal workers, ironworkers, painters and many other organizations, and our position is simple – the state must maintain competitiveness and transparency in bidding regardless of the bidding methodologies.

To reiterate, the basic principles we want to see in state construction include:

- **Transparency in Government Construction Work**
- **Fair Competition for Construction Businesses**
- **Low Cost, High Quality Buildings**
- **Protections for all Contractors**

Thank you again for holding this public hearing. I appreciate the opportunity to provide comments and would be happy to answer any questions you have at this time.



**Wisconsin Chapter**

**To:** Chairman Risser, Chairman Hintz, and Members; Senate Committee on Ethics Reform and Government Operations, Assembly Committee on Consumer Protection

**From:** John Mielke, Vice President  
Associated Builders and Contractors of Wisconsin, Inc

**Date:** December 15, 2009

**Re:** Assembly Bill 427/ Senate Bill 298 (State Construction Bidding Procedures)

I would like to express my appreciation to Building Commission Secretary Dave Helbach, the Division of State Facilities and the members of the Building Commission for working with us on this very important issue.

Associated Builders and Contractors of Wisconsin is a construction trade association that represents more than 800 general contractors, sub-contractors and other related businesses in Wisconsin. Our members work on state construction projects large and small all across Wisconsin.

On public construction projects, where the owner is the taxpayer, the default construction delivery process should be the one that best protects taxpayers. In our opinion that is the design/bid/build delivery method in current statute. This method requires the state to advertise and publicly bid construction projects, and then award the construction to the lowest responsible and qualified bidder or bidders. That process preserves open competition, promotes transparency, and saves taxpayer money.

If asked to choose between the current state bidding process and the process described in this legislation – we would choose current law.

However, we are not opposed to modifications to the current system. We understand that agency owners and the Department of Administration seek more flexibility in project delivery and management. But, that flexibility should not come at the expense of open competition and transparency.

(Over)



It is in that spirit that we respectfully offer the following suggestions for modification of AB 427 / SB 298.

- a) The legislation should require single prime contractors to submit a list of major sub-contractors and their bid amount to the department with the prime bid.
- b) Prime contractors should be required to receive department approval to deviate from the list or bid amount after bid opening.
- c) The construction manager should be required to award contracts to the lowest, responsible, qualified bidder in all categories (general contracting, mechanical, plumbing, fire protection, etc)
- d) The Construction Manager at Risk delivery method should be allowed only on "larger" projects (i.e. \$40 million indexed annually to inflation)
- e) In advance of the bid period, construction managers should be required to publically solicit prequalification's on the DOA website.
- f) The bid process should be open and transparent requiring construction managers to post bid tabulations for public review.
- g) The department should maintain the ability and responsibility to oversee advertisements for bids and bid openings regardless of delivery method

We feel by adopting these suggestions (and other suggestion related to administrative rules) state agencies can have flexibility desired while maintaining a more open and competitive process.

Thank you again for holding this public hearing. I appreciate the opportunity to provide comments and would be happy to answer any questions you have at this time.

# AIA Wisconsin

A Society of The American Institute of Architects

December 15, 2009

## Joint Public Hearing

### Senate Bill 298 & Assembly Bill 427

Senate Committee on Ethics Reform and Government Operations

Assembly Committee on Consumer Protection



### Committee Chairs & Members:

Thank you for this opportunity to comment on proposed legislation related to the use of alternative project delivery methods for state building projects. I am William Babcock, Executive Director of the Wisconsin Society of Architects, which is the state society of the American Institute of Architects [AIA].

It is not easy to build consensus when it comes to determining the delivery process to be used for the design and construction of a state facility. Every building project is unique; and every stakeholder brings a unique perspective to the process. The Building Commission and its Secretary are to be commended for working with a diverse group of organizations and interested parties to address the issues involved and develop recommendations.

We support the provisions in the proposed legislation related to the use of single prime contracting without requiring a waiver by the Building Commission. Wisconsin is one of less than a handful of states that continues to rely primarily on the multiple prime contracting approach. The proposed legislation would put the single prime approach on equal footing with multiple prime contracting, while offering protection to subcontractors in terms of bid shopping and related concerns. It could help reduce the administrative burden of managing, coordinating and closing out state building projects.

We also support provisions in the proposed legislation to allow the development of administrative rules governing the use of alternative project delivery methods that could be approved by the Building Commission through its existing waiver authority. These state administrative rules would better define and clarify the acceptable project delivery methods, the criteria for deciding among these methods and the selection process to be used for each method. Currently, there are no rules defining and governing the use of alternative delivery methods. The result is that new criteria and a unique process often must be created each time a waiver is approved by the Building Commission to use an innovative delivery approach for a particular state building project.

The "construction-manager-at-risk" approach is one of several alternative project delivery methods that is appropriate to be included in the mix of options available for state projects and defined in administrative rules. However, we believe the proposed legislation should be amended so that its use continues to require a waiver by the Building Commission, as would be the case for the other acceptable alternative project delivery methods prescribed by rule.

The Wisconsin Society of Architects represents 1,400 individual members, including architects in private practice, business, industry, government and education.

321 S. Hamilton Street  
Madison, WI 53703-4000  
Telephone 608.257.8477  
Fax 608.257.0242  
Email [aiaw@aiaw.org](mailto:aiaw@aiaw.org)  
URL [www.aiaw.org](http://www.aiaw.org)



**Madison Area  
Mechanical and Sheet Metal Contractors Assn.**

5940 SEMINOLE CENTRE COURT • SUITE 102 • MADISON, WISCONSIN 53711  
PHONE (608) 288-1414 • FAX (608) 288-1515

TO: Chairman Risser, Chairman Hintz, and Members

Senate Committee on Ethics Reform and Government Operations and

Assembly Committee on Consumer Protection

My name is Mike Christensen, President of H & H Industries, and I am representing the Madison Area Mechanical & Sheet Metal Contractors Association, the Mechanical Contractors Association of Wisconsin, and the Madison Association of Plumbing Contractors.

Our organization also has reservations as it relates to the current draft of SB 298 and AB 427. I am testifying for information and hope to start the dialogue of potential modifications that would make this legislation more acceptable to those of us bidding on state construction work.

The current default bidding process requires the state to advertise and publicly-bid construction projects, and then award the construction to the lowest bidder or bidders. That competition saves money. Open competition and transparency are assets that should not be cast aside lightly when committing tens of millions of public dollars.

Owner groups and the Department of Administration (DOA) are seeking flexibility in project management. We are prepared to support legislation that would allow that flexibility and provide the state with some relief in managing contracts. This legislation, however, also seeks to reduce competitiveness and transparency in the process of bidding.

It is important to distinguish the two – the bidding procedures and the project management. And it is important to note that we can accomplish a competitive and open bid process while improving project management.

We want to stress the importance of keeping in place basic principles behind the bid delivery process:

**Transparency in Government**—A multi-prime bidding process allows for wider access to how public dollars are being used as more facets of a bid are in full view of the public. Under single prime, builders and subcontractors are selected to bid and awarded work by the prime contractor, sometimes eliminating a publicly posted bid, limiting the pool

of bidders and potentially harming the ability for minority and women-owned businesses to participate.

**Fair Competition for Wisconsin Businesses**--The transparency and competitiveness that follows multi-prime bidding means that qualifying builders and contractors are selected on their ability to do the project for the lowest cost to the state instead of their relationship to a large prime or government entity. Protections for all contractors along the chain of command need to be identified and some put in statute. Furthermore, a state-standard contract would ensure fair procedures for payment and reduce unfair business practices such as risk and liability transfer.

**Low Cost, High Quality Projects**--A competitive and open bid process will bring about the largest pool of qualified bidders, which will drive down costs. To ensure quality, standards could be enforced that would require contractors bidding on state work to have previously done work on a project 50% or greater in size and scope and require that they be able to bond themselves. Without knowledge and control over which contractors are part of constructing state buildings, maintenance costs could become overbearing.

While it is difficult to suggest every modification that would need to be made in this legislation, I am confident it could happen without delaying the process too much. DOA has provided alternative solutions in previous documents and I can give you an example.

In order to maintain the same or similar bid process, a simultaneous bid opening could be conducted.

***Simultaneous bid opening*** -- Contractors submit bids for their portions of work to the state, all bids are open on the same day and lowest-responsible bids are awarded. The prime contractor is selected and serves as a single-prime contractor once the project begins operation to ensure better management.

Again, this is one example of how to modify the current bill so that a better bidding process is maintained while allowing for improved management on the project site.

On another topic, but certainly relevant, the state bidding process is not singularly responsible for problems and challenges to State and University of Wisconsin-System construction projects. Other aspects of the system of planning, enumerating, and constructing buildings bears some responsibility for the delays and coordination challenges that the State and UW want addressed. In addition to working to improve the bid delivery system, our organization, along with all the subcontractor groups, supports efforts to identify and address those issues as well.

I appreciate the opportunity to provide comments today. Our company is not outright opposed to the concept of this legislation and with some modifications would be able to provide support. We would like to see more details regarding sub protections in the legislation, as opposed to the rules. As we begin the legislative process, it imperative to my business and the state that we maintain some clear standard operating procedures for public-sector construction. Private-sector construction can conduct bidding, procurement and management without set standards and rules. However, I think we can all agree we have a larger obligation with publicly-funded projects.

We need to provide more details regarding sub protection in the legislation, as opposed to leaving this up to the rules process.



**J. F. AHERN CO.**  
**MECHANICAL & FIRE**  
**PROTECTION CONTRACTORS**

201 Morris Court, P.O. Box 1316  
Fond du Lac, WI 54936-1316  
(920) 921-9020 p • (920) 921-8666 f  
[www.jfahern.com](http://www.jfahern.com)

December 15, 2009

Good morning, Chairman Risser and Chairman Hintz and members of the respective Senate and Assembly Committees. Thank you for allowing me to provide information and feedback on behalf of J. F. Ahern and Co. on SB 298 and AB 427.

Ahern is a mechanical contractor, employing nearly 1000 state-wide. Our business is mechanical construction work, including heating, ventilating, and air-conditioning (HVAC), plumbing and fire protection.

I am here to testify for information on SB 298 and AB 427 relating to modifications to the State's bidding and procurement of construction projects. Our company has reservations with this legislation as drafted and my goal today is to provide more details on our position and provide information as it relates to the bidding process and how it affects our business.

Our involvement in State work is extensive. We serve primarily as a specialty-trade contractor or subcontractor. At times, especially if a project is largely mechanical in nature, we could serve as a prime contractor as well.

The State's default system of bidding currently is competitive and transparent. Currently, projects that exceed \$150,000 generally must be let by the Department of Administration ("DOA") as a "multi-prime" bid and award the contracts to the lowest qualified responsible bidders. Specifically, the default bidding process requires DOA to solicit single and separate bids on each portion of the work that DOA designates. As a result, under multi-prime bidding, each company has a direct contract with the State.

Under Senate Bill 298 and Assembly Bill 427, the DOA would be allowed to solicit multi-prime bids, single-prime bids, or designate a construction manager at-risk to bid the project. The DOA would have the discretion to designate a form of bidding and multi-prime bidding would no longer be required as the default.

While our organization will support the State's effort to find relief and flexibility in project management, which this legislation helps accomplish, we cannot support compromising competitiveness - and especially transparency - in order for that to occur.

Furthermore, we believe there are two separate but equally important issues; one being the bidding process and two the procurement and management of the project. I believe the primary goal of the State relates more to the latter while our goal relates more to the former. I am arguing today that the State must maintain as competitive and transparent of a bidding process

as possible. It is possible to achieve that goal and still allow the State improved management of the project.

As was mentioned, in state construction, the default bidding system is multi-prime. In essence, this means our company has a direct contract and direct relationship with the owner, or the State. Benefits of this direct relationship include assurance of prompt payment, immediate access to change orders in the project scope, and a consistent contract form among other things. Multi-prime without a doubt ensures THE MOST competitive and transparent process by ensuring the following:

1. A public bid announcement,
2. An open bid process, allowing all contractors to bid,
3. "Checkpoints" – ensuring a bid bond or certified check is received during process
4. Awarding the bid to the lowest, responsible, qualified bidder in all categories (general contracting, mechanical, plumbing, fire protection, etc).
5. The State serves not only as a manager of the bidding, but as a "watchdog" of the process, including awarding of bids and management of contracts
6. The documents, bid numbers and prices are kept confidential until bid-opening

Currently, should the State seek to conduct a different bidding process, the Building Commission may "waive" state law - and the multi-prime bidding system on a case by case basis - to use a different methodology, including single-prime and construction manager at-risk.

Single-prime means one contractor serves as the manager of the various subcontractor contracts and the project. Usually this is a General Contractor but if it is a project primarily mechanical in nature, it could be a specialty-trade contractor like J. F. Ahern Co. Single-prime at the very least makes most sense when 75% or more of the project scope falls under one trade (i.e. parking ramp, boiler replacement). It becomes unnecessary to bid out other trades when they make-up a smaller percent of the overall project scope.

Under single-prime, that "prime" contractor wins the project with lowest responsible bid, and then proceeds to bid out the rest of the subcontractor portions of the job. Because that prime contractor has already won the low-bid for that particular project, there are no more requirements to follow the State's default competitive and transparent bidding process to award the remaining portions of work on that project.

In other words, the single-prime contractor is able to choose which contractors can bid work, which contractors will win the bids, and is not required to choose lowest-responsible bidder or allow all contractors to bid in the first place. Additionally, any savings that can be realized by the State with the sub bidding is negated because the prime contractor has already won the bid and will be paid that price regardless if subcontractors submit bids much lower.

For example, if a \$30 million dorm at UW-Green Bay is bid multi-prime, all primary contractors will bid separately to the State, the bidding pool will be large and the State knows the project will come is as low as possible. Those contractors with the lowest, responsible and

J F Ahern Co  
December 15, 2009

qualified bid will construct the dorm. If their collective bids come in at \$25 million, that savings is directly accessible to the State.

Under single-prime, only the "prime" contractor will bid the entire scope of the UW-GB dorm to the State. The low-bid could come in at \$25 million, like our multi-prime example and the same savings will be reflected. However, this may not always be the case. For example, if the entire project low-bid comes in at \$29 million from the single prime contractor, but the collective bids that contractor later takes from all specialty trades creates a savings, that savings is not realized by the State.

Similarly, the construction manager at-risk (CM) does not give the State money that is saved by bidding out other portions. Construction manager at-risk, does; however, inherently mean the State receives a guaranteed maximum price from that CM. The CM is selected by DOA, and then proceeds to take bids for remaining portions of the work. The State pays a CM a fee for management services. Usually the State requests a CM when a project is extraordinarily complex in nature and when they want the CM to come in during the design phase.

This legislation, as drafted, does not require either the contractor serving as prime or the CM to advertise and publicly-bid the project, nor does it require them to award to the lowest-responsible bidder or bidders.

To be clear, in these examples of single-prime and CM bidding, Ahern could be selected to bid and/or selected to do the work, but there is no guarantee we will even have the opportunity to bid. I think we can all agree that the more qualified contractors that are bidding the more we can drive down costs.

J. F. Ahern Co., along with other specialty-trade contractors and subcontractor organizations, believes public-sector work is innately different from private-sector work because we have an obligation to provide transparency and ensure a fair process when using taxpayer dollars.

When a single-prime contractor or construction manager is used in order to transfer management and responsibility from the State, this does not mean the project becomes a private-sector job. In simple terms, those entities are acting as an agent of the State. And in even more simple terms, the bidding process ought to be carried out similarly to the State's competitive and transparent process. If contractors disagree, I would argue they ought to stick to private-sector work.

One could argue it is in the best interest of these "agents of the State" to negotiate down the subcontractor bids and retain the difference. As drafted within this legislation, the single-prime and construction manager at-risk systems are not currently set up to engage in a public bidding process.

In closing, I want to reiterate that multiple-prime is THE most competitive and transparent bidding process. Any modifications to State bidding or procurement practices need to be equally competitive and transparent in order for our organization to support more flexibility for



J F Ahern Co  
December 15, 2009

the State and owner groups. And while it may be desirable to have one point of contact and a single-responsible party for a project, this legislation is ineffective as drafted.

We are not opposed to change, specifically as it relates to the operation and management of State construction projects. However, any variance of the default system ought to maintain the competitiveness and transparency during bidding.

Thank You.

**J. F. Ahern Co.**

Robert J. Fischer, P.E.  
Executive Vice President



**Exec. Vice President**  
Loyal D. O'Leary

**Governor**  
Jerry Schulz

**President**  
Bernie Cleppe

**Vice President**  
Mark Hady

**Treasurer**  
Joel Westphal

## Wisconsin Chapter National Electrical Contractors Association

2200 Kilgust Road • Madison, Wisconsin 53713 • [www.wisneca.com](http://www.wisneca.com)  
Telephone (608) 221-4650 • Fax (608) 221-4652

# Competitive Open Bids

## Best Public Policy / Best for all of Construction

### **AB 427/SB 298**

#### *Revision of State Building Contracting and Construction Procedures*

Wisconsin has a long tradition of having multiple prime bids on State Construction Projects. This practice which ensures open, competitive bidding for work funded by Wisconsin Taxpayers has helped ensure that every construction worker and contractor has a full and equal chance to be awarded State Construction Contracts.

The bill as introduced has two main components. First the bill permits DOA either to: 1) solicit both single and separate bids on any division of the work it designates; or 2) solicit only single bids on all divisions of the work that DOA designates. Second the bill also enables DOA to utilize "construction-manager-at-risk" procedure whereby DOA hires a manager to provide pre-construction services and to manage the construction process.

We recognize and agree that the State of Wisconsin would benefit with a change in project management for construction in state buildings to reduce administration and increase accountability. The second component of the bill meets this goal by allowing a separate project manager to oversee all of the administration of the project and reduce the workload on the State, especially at a time like now when State resources are thin.

Our major concern is with the first component of the bill – the bidding process. By allowing more single prime bids the State is allowing large construction firms to decide who is allowed to bid the majority of the work on State Construction Projects.

If single prime bidding is used this will mean that the single bidders will control and limit what subcontractors can be involved in bidding on State work. If you do not have the relationship with a general contractor you will not be part of their bid proposal. This will create a network of general contractors with favorite subcontractors who are the only companies allowed in the bidding for State work.

With a simple modification we can keep the major benefit for the State and still allow everyone to bid openly on State Contracts. By requiring all projects to use the current bidding process and then turn the contracts over to the Project/Construction Manager, the State would still gain in reduced administration and increased accountability while preserving the current open bidding process.

We ask that you either modify AB427 and SB 298 or reject them to keep the current system that will allow all construction workers and companies to bid and work on State Contracts.

Chapter Board of Directors

**Kenosha Division**  
Greg Dewitz  
Great Lakes Electric  
Kenosha

**Madison Division**  
Darrell Braun  
Braun Electric  
Madison

**Racine Division**  
Bernie Cleppe  
Roman Electric Co.  
Sturtevant

**Janesville-Beloit Division**  
Mark Hady  
Hady Electric, Inc.  
Watertown

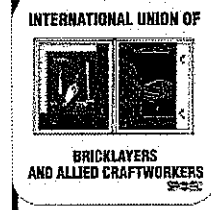
**La Crosse Division**  
Tim Padesky  
T.D. Padesky Electric, Inc.  
La Crosse

**Northeastern Division**  
Joel Westphal  
QWEST Electric  
Green Bay

**Wisconsin Valley Division**  
Bob Van Ert  
Van Ert Electric Co., Inc.  
Wausau

**Fox Valley Division**  
Larry Navarrete  
Excellence Electric, Inc.  
Little Chute

**Indianhead Division**  
Arlan Hanson  
A.A. Hanson Electric, Inc.  
Osceola



## **Competitive Open Bids**

### **Best Public Policy / Best for all of Construction**

#### **AB 427/SB 298**

#### *Revision of State Building Contracting and Construction Procedures*

Wisconsin has a long tradition of having multiple prime bids on State Construction Projects. This practice which ensures open, competitive bidding for work funded by Wisconsin Taxpayers has helped ensure that every construction worker and contractor has a full and equal chance to be awarded State Construction Contracts.

The bill as introduced has two main components. First the bill permits DOA either to: 1) solicit both single and separate bids on any division of the work it designates; or 2) solicit only single bids on all divisions of the work that DOA designates. Second the bill also enables DOA to utilize "construction-manager-at-risk" procedure whereby DOA hires a manager to provide pre-construction services and to manage the construction process.

We recognize and agree that the State of Wisconsin would benefit with a change in project management for construction in state buildings to reduce administration and increase accountability. The second component of the bill meets this goal by allowing a separate project manager to oversee all of the administration of the project and reduce the workload on the State, especially at a time like now when State resources are thin.

Our major concern is with the first component of the bill – the bidding process. By allowing more single prime bids the State is allowing large construction firms to decide who is allowed to bid the majority of the work on State Construction Projects.

If single prime bidding is used this will mean that the single bidders will control and limit what subcontractors can be involved in bidding on State work. If you do not have the relationship with a general contractor you will not be part of their bid proposal. This will create a network of general contractors with favorite subcontractors who are the only companies allowed in the bidding for State work.

With a simple modification we can keep the major benefit for the State and still allow everyone to bid openly on State Contracts. By requiring all projects to use the current bidding process and then turn the contracts over to the Project/Construction Manager, the State would still gain in reduced administration and increased accountability while preserving the current open bidding process.

We ask that you either modify AB427 and SB 298 or reject them to keep the current system that will allow all construction workers and companies to bid and work on State Contracts.